Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,

Petitioners,

v.

KIMBERLY ANN GREENWELL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, KIMBERLY ANN GREENWELL

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BRIEF IN OPPOSITION

Kimberly Ann Greenwell respectfully represents:

STATEMENT OF THE CASE

Petitioners seek review by this Court of a *per curiam* unpublished opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the compensatory damages awarded to Kimberly Ann Greenwell (hereafter "Greenwell" or "Kim Greenwell") for gender discrimination, sexual harassment and retaliation under federal and state law. The Fifth Circuit, with one exception, affirmed the trial court's determination that there was sufficient evidence to support the jury verdict. The Fifth Circuit reversed the award of punitive damages, however, finding a lack of sufficient evidence to support this award.

With nothing more than a question of sufficient evidence before it, the Fifth Circuit's single sentence affirmation of the compensatory damage award demonstrates that there is little for this Court to review. Petitioners' request for *certiorari* should therefore be denied.

A. STATEMENT OF FACTS

Kim Greenwell spent four years on active duty in the U.S. Navy as an aircraft mechanic. She encountered no problems getting along with her fellow sailors or superior officers and received two promotions and three awards. Following her discharge from active duty, she went to

work for Raytheon (known then as "BASI") as an aircraft mechanic.

During the more than five years that Raytheon employed Greenwell, Raytheon had a contract with the U.S. Government to maintain military aircraft at over 140 sites worldwide.[1] Both military pilots and support staff and Raytheon employees worked at these sites. The contract was described by a Raytheon official as "a turnkey operation." The military pilots "get in the airplane, they fly off, they land, and they walk away. We do everything to it."

Greenwell worked at two Raytheon sites in California for about two years and she got along well with her superiors, fellow workers and the customer at both sites. Her initial evaluation[2] by Raytheon stated:

> Kim is a good aircraft mechanic, and fast becoming a great one. She is a self-starting fast learner, who when given a job to do carries it out to the very end. When Kim is not working on aircraft, she is reading the maintenance manual about them. Kim is well liked by everyone at Base 516 and is an asset to the Moffett Field BASI team.

On her second evaluation, her supervisor commented:

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[1] At each of these sites, Raytheon's liaison under the contract was a Leadperson and the military's liaison was the Contracting Officer Representative or "C.O.R."

[2] Greenwell received ratings of satisfactory or above average in all six categories and the best rating for Safety Habits on all five subsequent evaluations until August 1994, three months after Raytheon's customer was notified of her sexual harassment complaint.

> Kim is an outstanding young lady. Her attitude and initiative coupled with her judgment is an outstanding asset in the sometimes turbulent world of test and integration. Her job knowledge, quality and quantity of work is unsurpassed by her peers. As her experience grows so does her self confidence. She will someday be a fine BASI Leadperson.

In 1992, Greenwell was promoted to Leadperson[3] and transferred to the Lakefront Airport site in New Orleans. Her supervisor at the time of her promotion and transfer stated on her last evaluation in California that she "has done an excellent job" and predicted that as Leadperson she "should do fine with [ ] minimal problems."

Raytheon's customer at the Lakefront site, the Louisiana Army National Guard ("the Guard"), had one C-12 aircraft which was housed in the Guard's hangar, along with the Raytheon workshop and Guard offices. This was a new site under the contract and the Guard had previously maintained its own plane without an outside contractor. During Greenwell's two years at Lakefront, Raytheon had two employees at that site: Greenwell and Jim Stout, a mechanic whom she supervised. Greenwell reported to Lakefront in early August 1992. Stout did not arrive until November 1992. While at Lakefront, Greenwell reported to her Area Supervisor at the home office

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[3] A Leadperson's duties included a mechanic's duties – to keep the aircraft serviced and flying – as well as responsibility for the bed down (the site), completing all required paperwork and logbooks, and delegating work assignments. As the senior Raytheon representative, the Leadperson had ultimate responsibility for what happened at the site.

who, for the first 18 months, was Walt House. In November 1992, the Guard's C.O.R., Norris Babin, praised Greenwell's abilities to House and told him she was doing a good job. As of that time, she had maintained the C-12 alone from her arrival in August 1992 until Stout's arrival in November 1992. Greenwell found Stout to be a poor performer who required specific instructions or "he wouldn't do anything." Although Stout and Greenwell got along at first, their relationship deteriorated rapidly after the home office suspended him twice in 1993, for time card falsification and for leaving early without completing assigned work.

Acts of Discrimination and Sexual Harassment

From the time of her arrival at Lakefront until her demotion and removal from the site two years later, Greenwell experienced a continuous atmosphere of gender-based hostility and harassment on the part of the Guard.[4] She never saw the Guard treat anyone else this way and she did not recall any females in supervisory positions at Lakefront. The Guard's hostile conduct toward her included:

* Greenwell encountered significant and ongoing obstacles in setting up the Raytheon workshop. Although the Guard was required under the contract to provide

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[4] Petitioners argue that Greenwell's hostile environment claim is limited to a period of less than four months and includes only two specific acts of alleged sexual harassment. However, as detailed below, the Guard's conduct over a two year period constituted a continuing violation of federal and state law.

Raytheon with a work shop and furnishings, it assigned Greenwell a very small room in the hangar with bars on the windows, no air conditioning or office furnishings and only one small light on the ceiling. Greenwell reported these difficulties to House "numerous times." She described the condition of the Raytheon worksite when House first visited Lakefront as follows: "I had a cardboard box as a desk. I believe I might have had a milk crate for a seat . . . I had manuals just on the floor. We had no table, not really anything, just a telephone on the floor." Greenwell had previously asked a Guard representative if she could use a desk that was located upstairs in the hangar, but was told that it was reserved for someone. When House asked Babin if she could use the same desk, he said yes. Greenwell experienced this situation many times – her repeated requests to the Guard went unheeded until her male supervisor intervened. Similarly, the Guard typically went to Stout, Greenwell's subordinate, with concerns or requests instead of going directly to her.

* Guard officers repeatedly used demeaning language in the hangar to refer to Greenwell, both in and out of her presence. About a month and a half after Greenwell arrived, she was informed by a Guard officer that Mike Boudreaux, the Alternate C.O.R., had referred to her as "the BASI bitch."[5] Greenwell immediately reported

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[5] Mike Boudreaux admitted that he referred to Greenwell as "the BASI bitch" to others on various occasions "in anger." According to the unrebutted testimony of another Guard officer, Greenwell was referred to as "the BASI bitch" a couple of times a day by various Guard mechanics working in the hangar throughout the two years that she worked at Lakefront.

this to both Babin and House. She and House met with Babin about this incident and, according to Greenwell, House told Babin that "[i]f Raytheon was to hear about this, there would be a lot of trouble."[6]

* On the very day that she reported the "BASI bitch" comment to Babin, one of Greenwell's car windows was broken. She reported this incident to Babin and received three different explanations from the Guard about how the window had been broken.

* Greenwell experienced a "lot of trouble" with the C-12's flight schedule. The Guard pilots repeatedly left in the C-12 in the morning and would not call to advise when they would return. As a result, sometimes Greenwell had to wait at the site all day or all night for the plane's return. This was "a continuous problem" throughout her two years there. She even bought a beeper and asked the pilots to call the beeper number and punch in their estimated return time, but the pilots used the beeper only for "a couple of weeks." Greenwell had never experienced such problems at other sites.

* In a discussion where Greenwell was inquiring about the possibility of other work space, a senior Guard officer told her, "[i]f I had my way with you, little girl, I'd stick you back in the building over there where no one had to look at you again." Babin referred to her in his presence as "BASI gal."

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[6] The obvious implication of House's remark is that he did not report the incident to anyone at Raytheon. Greenwell was the only person who testified about this statement. Babin testified that he did not recall the discussion and Raytheon did not call House at trial.

* "Quite a few times" while Greenwell was working on the C-12 in the hangar, Guard officers would turn off the lights in the hangar which could not be turned back on for 20-30 minutes. Sometimes Guard officers locked the hangar doors or gate to the airport when they knew that she was working inside.

* In April 1994, the aircraft was temporarily moved to another location in the hangar. At the Guard's request, Greenwell and Stout had placed tape on the hangar floor to mark the temporary spot. After the plane was moved back to its regular spot, she and Stout were performing repairs on the aircraft. Babin approached Greenwell and began screaming and cursing at her to remove the tape from the floor. She advised him that the airplane was down for repairs that they were trying to complete. Babin cursed and repeated his command in a very loud and angry voice. This was the first request Greenwell received from a Guard officer to remove the tape.[7] After this demand from Babin, Greenwell and Stout discontinued their repairs to the aircraft and scraped the tape from the floor. Greenwell was required to report each month the number of Raytheon's hours at the site and classify the time as "reporting time" or "non-reporting time."[8] She

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[7] As with other incidents, a Guard maintenance officer had previously told Stout, rather than Greenwell, to remove the tape. When Stout passed this on to Greenwell, she told him that they would scrape the tape up after they completed repairs which were required before the C-12 could fly.

[8] "Non-reporting time" was time when the aircraft was down, but which was not chargeable against Raytheon in computing the operational ready ("O.R.") rate. Under the contract, Raytheon was obligated to maintain an O.R. rate of at

reported two hours of non-reporting time on the April 1993 Monthly Status Report for time she and Stout spent scraping the tape from the floor. This angered Babin who called army officials at ATCOM; someone from ATCOM called the Raytheon home office.

* The climax of the Guard's hostile conduct occurred in July 1994 and precipitated Greenwell's demotion and removal from Lakefront. Five Guard officers wrote four letters to Raytheon complaining about her mechanical skills and personality. These letters contained 12 specific mechanical complaints, all but one of which had occurred in the 22 months *before* May 1994.

Unheeded complaints of sexual harassment

Greenwell enjoyed a good relationship with House and reported to him the Guard's pattern of harassment "every time, continually." House told her that he thought the Guard treated her that way because she was a woman. There was no evidence that House ever reported Greenwell's hostile environment complaints to anyone at Raytheon or took any steps to investigate the complaints.

House visited Lakefront 4-5 times and spent 2-4 days there on each visit. He noted on her August 30, 1993 evaluation that Greenwell had done "a good job" in the past year, that her "drive and initiative are noticed by all who come in contact with her at this site" and that her

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least 80%, i.e., each aircraft had to be ready and able to fly at least 80% of the time. If the O.R. rate fell below 80%, Raytheon would be penalized. Throughout her two years as Leadperson at Lakefront, Greenwell maintained an O.R. rate of about 92%.

"technical and mechanical ability have improved greatly over the past year." House conducted a Quality Assurance Audit at Lakefront in November 1993, 16 months after Greenwell became Leadperson. She received an "excellent" administrative rating (for paperwork and beddown) and a "good" maintenance rating.

Wayne Leese became Greenwell's Area Supervisor in January 1994 and she met him in February 1994 when he made his first visit to Lakefront. The C-12 was gone during this visit, but Leese reviewed the site and aircraft records. He testified that "it appeared to [him] that she was doing quite well and it didn't [ ] appear to [him] that [he] had any problems at the site." Her next contact with Leese was a telephone call from him in late April 1994, after she had reported the tape scraping incident on the April 1994 Monthly Status Report. Greenwell described the conversation as follows:

> Q. . . . And what did he say?
>
> A. He told me that I should have never put two hours non-reporting time for scraping tape up on the status report, that Norris was very upset over it, that Norris called ATCOM, and ATCOM called BASI, and BASI told him, and not for me to do anything to get myself removed from that site. And I didn't understand that. I asked him what he meant and I told him what had been going on at Lakefront for the past almost two years with their attitudes and uncooperation and comments that they made towards me with not helping with flight schedules and just the whole gist of things. He didn't say much about that. He

just said, 'Well, just don't get anything to get yourself removed from the site.'

Q. Did you tell Mr. Leese everything that you had told Walt House that had happened?

A. Everything. Everything.

Q. Did you tell Mr. Leese why you thought the Guard treated you this way?

A. Yes. Yes.

Q. And –

A. I'm sorry. And I had told him that Walt House felt the same way; that they were treating me this way because I was a woman.

Q. And Walt House had told you that?

A. Yes, he had.

The so-called "investigation"

Leese then told his supervisor, Ron Paschal, about Greenwell's complaint and Pascal did think she was being harassed by the Guard. Leese then notified Bill Ogle, Raytheon's Director of Human Resources, of the complaint. Although Ogle told Leese to investigate the complaint and take necessary corrective action, Leese was not certain that Ogle even mentioned the subject of retaliation to him. Leese admitted that he took absolutely no steps to prevent the Guard from retaliating against Greenwell.

On May 4, 1994, about ten days after Greenwell reported the Guard's pattern of sexual harassment to him, Leese arrived unannounced at Lakefront and told

her that he was there to conduct a sexual harassment investigation. He first spoke to Greenwell who described their conversation as follows:

> He just wanted to know about the tape-scraping incident, the way Norris Babin talked to me, and the BASI bitch comment. That was all he asked me about. When he said he was there to do a sexual harassment investigation, I – I just – I didn't know – I didn't know what he meant by that, and he said, 'Do you consider BASI bitch being sexual harassment?' We discussed it, and I told him yes. He said, 'Do you consider the way Norris' tone of voice is sexual harassment?' And I asked him then, I said, 'Are you going to go in and talk to these people? Am I going to go in with you?' He said, 'Yeah, we're going to go talk to them.' And I said, 'Well, I don't want to use the word "sexual harassment", even though I feel it is sexual harassment, but I don't want to use that word. That will freak those guys out. I know them. I've worked here for almost two years.' I said, 'We can probably approach them a little different.' I said, 'Let's not use the word' – I said, 'if we use the words sexual harassment,' I said, 'bad things are going to happen to me here. I know that.' And he said, 'Do you think it's considered sexual harassment, his tone of voice?' I said, 'Yes, but I don't want to use those words.' That was the end of our conversation and he just focused on the BASI bitch, the harassment, and that was the end of that conversation.

Leese described the conversation as follows:

> I spoke to Kimberly about it and she reiterated the story regarding the tape on the floor,

> and she also discussed some of the other problems that she was having at the site. I don't recall all those right offhand. I do remember that she discussed the oxygen servicing problem and a few others, but I don't recall all of them right offhand.
>
> At that time, she also informed me that she didn't – didn't feel that – she didn't think it was a sexual harassment as such because it was maybe – I believe her exact words were that the – let me think a moment. Her words were that maybe sexual harassment would be too harsh of a term.

Leese then met separately with only two Guard officers,[9] Babin and Col. Philip Nuss, the State Aviation Officer, and admitted that he "told them that she had claimed sexual harassment but she had retracted her statement." Nuss understood that "that complaint was retracted by [Greenwell's] own volition." According to Babin, "I initially was accused, but I understand that it was recanted, or she retook that statement back." Leese testified that he "informed [Babin] that Kimberly had retracted the sexual harassment charge and basically was concerned about the loud tone of voice that he had used." Consistent with Leese's testimony was Babin's understanding that the basis of the retracted complaint was limited to his yelling and screaming at Greenwell about the tape scraping incident.

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[9] Defendants misrepresent that "Leese interviewed several Guard employees, including Babin and Michael Boudreaux." Petition at 6. There is no evidence in the record that Wayne Leese interviewed anyone other than Babin and Nuss.

It was not until *after* Leese told Babin that Greenwell had made (and then supposedly retracted) charges of sexual harassment against him that Babin *for the first time* informed a Raytheon employee that the Guard was dissatisfied with Greenwell's mechanical skills.

No representative of the Guard had ever complained orally or in writing to Greenwell or to Raytheon about her mechanical skills *until after Babin was informed that Greenwell had made (and then supposedly retracted) a sexual harassment complaint against the Guard.*[10] Leese recalled at trial one specific complaint about Greenwell's mechanical abilities that Babin relayed to him in the May 4, 1994 conversation after Leese told him about her sexual harassment complaint. This concerned an incident where the brakes allegedly failed on landing. Babin testified that the incident occurred "in the beginning, probably in '92", but admitted that he had never documented it or reported it to anyone.

The next day, May 5, 1994, Leese met again with Nuss. Unlike the previous day's meeting where they discussed Greenwell's complaint, at the second meeting Nuss brought up *for the first time* alleged problems with her mechanical skills. After speaking with Nuss and Babin, Leese spent about 3-4 hours conducting an unannounced inspection of the C-12 and found about 94

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[10] Babin had received a Customer Satisfaction Survey from Raytheon as early as November 1992, but disingenuously claimed that he did not return it to Raytheon because he "wanted to give her a chance" and he "didn't really feel like [he] wanted to give her a bad rating."

discrepancies.[11] Leese then told Greenwell that he had spoken to Nuss about her complaint and Nuss assured him that the Guard did not tolerate sexual harassment. Leese also told Greenwell that Nuss said that, if she would smile at the Guard a little more, she would probably fit in better. Leese also suggested that she laugh at the Guard's off-color jokes, even if she did not find them funny, so that she would fit in better.

Leese then discussed the discrepancies with Greenwell and Stout. After asking Stout how long he had been in aviation, Leese told him that, if he ever saw Greenwell looking like she didn't know what was going on, he should try to give her a hand. Leese then handed her a one page document entitled "Sexual Harassment Investigation" and asked her to read and sign it. Being "very upset" at Leese's bungling of the investigation in light of her fear of retaliation from the Guard, Greenwell "just looked at it and signed it." Although she had told Leese

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[11] A discrepancy is "anything from a piece of paper on the carpet, chipped paint, anything that's not supposed to be on the aircraft." It can range from a very minor thing to a major problem. Leese testified that "it's not unusual to find discrepancies on an airplane. Every airplane that I inspect has discrepancies." To place the approximately 94 discrepancies into perspective, shortly after his May 1994 inspection at Lakefront, Leese conducted an announced inspection of a C-12 at Raytheon's Belle Chasse site and found about 500 discrepancies, including six "safety of flight" items, i.e., discrepancies which cause the aircraft to be grounded until corrected. During this same month, May 1994, a Quality Assurance Audit was performed at Lakefront by a Raytheon Q.A. inspector. Greenwell received an administrative rating of excellent and a maintenance rating of good or very good.

the details of the Guard's two year pattern of harassment, the document only mentioned the tape scraping incident and the "BASI bitch" comment.[12] This was the extent of Raytheon's "investigation" of Greenwell's complaint.

Raytheon's retaliation against Greenwell

The Guard's retribution was swift and direct. Ten weeks after Babin and Nuss were informed of her complaint (and supposed retraction), five Guard Officers sent four letters to Raytheon, complaining of numerous examples of Greenwell's poor maintenance skills and bad attitude. None of these five individuals (or any other Guard member) had ever previously complained to Raytheon about her mechanical abilities, and had only complained once to Raytheon about *any* non-mechanical matter involving Greenwell (the tape scraping incident). On July 22, 1994, copies of the letters were given to three Raytheon officials and Ogle. After reading the letters, the officials decided that Greenwell had to be demoted to mechanic and transferred to another site. They then spoke to Ogle to ensure that Human Resources concurred and asked him to join them for a meeting with Greenwell who was then at the home office.

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[12] The document refers to the "BASI bitch" statement as though it were an isolated remark and stated "[t]he offensive statement by another national guardsman which occur[r]ed about eighteen months ago was sexual harassment." However, the evidence was unrebutted that the remark was made on a daily basis throughout Greenwell's two years at Lakefront. Despite the fact that Leese knew that Mike Boudreaux had referred to Greenwell as the "BASI bitch", he did not even bother to speak to Mike Boudreaux.

Ogle concurred in the transfer and demotion decision solely on the basis of the Guard letters. Paschal testified that, on the same day he read the letters, he had received third-hand, unverified information that indicated "poor maintenance" on the C-12's air conditioning system.[13] These three officials then met with Greenwell and told her that they had received letters from the Guard and, because of the letters, Raytheon had to transfer her. Greenwell responded that she knew this would happen after Leese used the term "sexual harassment" to the Guard. They also informed her of her demotion.[14]

At the time these three officials notified Greenwell of her demotion, none of them had ever been to Lakefront while she worked there. None of them had ever spoken to any of the five authors of the letters. None even knew if the five persons identified as authors of the letters actually were Guard officers at Lakefront. Not one of them spoke to House, her supervisor for three-fourths of the time covered by the complaints in the letters, although he was at the home office that day. None of them tried to

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[13] The air conditioning system on the C-12 had been inoperative off and on for seven weeks prior to July 22, 1994. During that time, the a/c system was worked on by Greenwell, Stout and a Raytheon rover mechanic. In July 1994, a Guard officer made an emergency landing in Austin, Texas because he smelled smoke in the cockpit. When the C-12 landed in Austin, the C.O.R. only asked the Raytheon mechanic to look at the a/c system.

[14] Raytheon repeatedly refers to Greenwell's "transfer" and even misrepresents that her "transfer resulted in a $4,368.00 per year salary reduction." Petition at 8, n.13. Greenwell's *demotion*, not her legally-innocuous transfer, resulted in the salary reduction.

contact any of the five authors of the letters. Ogle and the two other Raytheon officials thought it was "kind of strange" that Raytheon received the first complaints from the Guard after Greenwell had been at Lakefront for two years.

One piece of information that the three men who decided to demote Greenwell did have was the fact that she had complained only ten weeks earlier of sexual harassment by the very authors of these letters. Prior to their meeting with Greenwell, the three officials discussed the fact that she had filed a complaint ten weeks earlier.

Although Raytheon's policy is to allow an employee to explain his or her side of the story when a customer requests the employee's removal from a site, Greenwell was not shown the letters at the meeting, was given no specifics of the complaints, and was not even told who had written the letters.

Following her demotion, Greenwell worked as a mechanic at the Raytheon site at Belle Chasse, Louisiana for 21 months. At the time of her demotion and transfer, the then Leadperson at Belle Chasse was transferred to Lakefront as Leadperson and Lance Fachman, then a mechanic at Belle Chasse, was promoted to Leadperson there. Greenwell then replaced Fachman, who became her new supervisor. In August 1994, three months after the "investigation" of her sexual harassment complaint, Greenwell received her first below satisfactory evaluation signed by Leese.

In the 21 months she worked at Belle Chasse, Greenwell got along well with the pilots and her co-workers. Fachman found her to be a productive worker with a positive attitude, pleasant to be around and a quick

learner. In October, 1994, she and another mechanic received a write-up from Fachman for a mechanical mistake (overtorquing bolts) which they readily admitted, upon questioning by Fachman. Fachman testified that he considered the mistake to be about a 4 or 5 on a scale of 1-10, with one being the least serious mistake. He considered the matter closed after he spoke to Greenwell and the other mechanic, they both admitted responsibility, and said it wouldn't happen again. Fachman wrote up the incident a month later, only after Ogle called him two times and urged him to write her up and Leese, his supervisor, told him two or three times to write up the incident "for the record" and send it to Ogle. Fachman admitted that he felt that his job security would be implicated if he didn't write her up.

After being told by Raytheon's Vice-President of Operations, John David Robinson, that she had to choose between the "career path" and the "litigation path," Greenwell resigned from Raytheon in April 1996 because she felt her career with Raytheon was over.

B. PROCEDURAL HISTORY OF THIS CASE

After enduring almost two years of sex-based harassment at the hands of her employer's customer, followed by a humiliating demotion after her employer botched the investigation into her complaints, Kim Greenwell filed suit in United States District Court for the Eastern District of Louisiana alleging discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e, invoking the supplemental jurisdiction of the court to hear claims under Louisiana law, La. R.S. 51:2234 *et seq.* and La. R.S.

23:1006.[15] Following a five day trial, a seven person jury returned a verdict in favor of Greenwell on federal and state discrimination and retaliation claims, awarding her $100,000 in compensatory damages and $500,000 in punitive damages. The district court awarded an additional $7,520 in back pay, and denied all motions made pursuant to FRCP 50(a).

Post-trial, petitioners moved for judgment as a matter of law under FRCP 50(b), citing a total of nine arguments, seven of which sought relief due to insufficient evidence.[16] The trial court denied the motions, stating its "firm[ ] belie[f]" that sufficient evidence supported the jury findings.[17]

Petitioners sought relief on the identical sufficiency of the evidence grounds in the Fifth Circuit, which disposed of these arguments in a single sentence *per curiam* opinion.

Three of those same sufficiency of the evidence complaints appear again before this Court in the guise of conflicts in the circuits, both internal and external.[18]

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[15] Greenwell's claims under La. Civ. Code art. 2315 for intentional infliction of emotional distress against her employer and Wayne Leese were eventually dismissed, as were all claims against Robinson, an additional defendant.

[16] The remaining two complaints dealt with the punitive damages award, which was remitted by the trial court in accordance with 42 U.S.C. § 1981a, and an evidentiary ruling which was deemed moot with the dismissal of claims against Robinson.

[17] *See*, Page 7a of Petitioners' Appendix.

[18] *See*, Page 5a of Petitioners' Appendix, numbers 1, 2, 3 and 4.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

Petitioners have done nothing more than recycle their sufficiency of the evidence arguments into standard of laws arguments, raising the specter of a "split in the circuits", in an attempt to gain this Court's review. To do this, petitioners have carefully dissected the evidence presented to the trier of fact, selecting only tidbits of testimony and documents to present to this Court, causing the case on which they seek review only vaguely to resemble the case as a whole which was presented to the jury. The determination of the jury was well supported by the factual findings which were reviewed by the trial court and affirmed on appeal. This Court's resources are best devoted to cases which present compelling reasons for review; the instant matter is not such a case.

ARGUMENT

I. Petitioners have failed to seek *certiorari* on the case that was presented to the jury for determination and reviewed by the district court and the court of appeals. Rather, petitioners have gleaned from a much broader factual presentation certain discrete propositions, which were found not credible by the trier of fact.

A. The jury heard evidence of a long-standing pattern of gender discrimination and sexual harassment which far exceeded the hostile environment claims presented by petitioners in seeking *certiorari*.

The evidence presented at trial revealed a persistent history of discriminatory harassment due to Greenwell's

gender during the entirety of her tenure as Leadperson at Lakefront Airport. The jury heard testimony that Greenwell was referred to in derogatory terms in reference to her gender, such as "BASI Bitch" "BASI gal" and "little girl." Greenwell's subordinate, Stout, lamented in her presence that she was not Kim Basinger.

The evidence showed that Greenwell received no cooperation in setting up her shop at Lakefront Airport, and she eventually had to rely on her male supervisor, Walt House, to intervene and obtain the contractually agreed upon provisions to set up Raytheon's working space. The Guard further refused to acknowledge Greenwell's position as Leadperson by consistently failing to notify her of the flight schedule so that she could be present at the site to perform her duties. Nor was it uncommon for Greenwell's work to be deliberately interfered with by Guard members who would turn off the lights, lock her in the hangar, and lock the gates surrounding the facility, all after clearly observing her at work on the aircraft inside the hangar.

The Guard made no secret of its gender bias towards her when a Guard supervisor insisted their own male mechanic be brought over to "help" Greenwell troubleshoot a problem with the plane, despite the fact that Greenwell herself had barely begun to locate the difficulty, and actually solved the problem by the time the Guard's mechanic offered his advice. Indeed, the Guard's communications with Greenwell eventually all but

ceased, in favor of her male subordinate, Stout, while the consequences nevertheless flowed to Greenwell.[19]

Petitioners' version of the facts does not comport with those heard by the jury. When viewed in its entirety, the record is clear that Greenwell endured a persistent

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[19] The jury heard Greenwell explain it as follows:

Q. Now, can you tell us about some of the things that happened during the first few months you were there? Did things ever change between you and the National Guard?

A. No. Things never changed. It was their same attitude, their same – the same lack of cooperation the whole almost two years I was there. It never changed. It would get better for a while, but it would always go back to where it was or worse.

. . .

Q. Did the National Guard officers ever show any attempts to make your job easier or to assist you in doing your job functions?

A. No. No, they did not.

pattern of harassment while Leadperson at Lakefront Airport. The findings of the jury and the holding of the Fifth Circuit do not create a conflict in the circuits, nor do they violate this Court's determination in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993).

B. The facts of the so-called "investigation" by petitioners were presented in full to the trier of fact, which chose to disbelieve the version of events presented by petitioners both at trial and to this Court.

Quite simply, the facts presented by petitioners for review by this Court were not the facts heard by the jury and reviewed by the trial court and the Fifth Circuit. The jury heard Greenwell explain that she complained continuously to her supervisor for almost eighteen months of the discriminatory treatment she suffered at the hands of the Guard.[20] Indeed, her previous supervisor often had to intervene on her behalf after learning of the customer's refusal to deal with a female Leadperson.

When Leese became Greenwell's new supervisor, she tried to apprise him of the gender-hostile environment she endured, and he chose to focus on only selected incidents, ignoring the pervasiveness of this behavior.

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[20] Greenwell testified:

Q. All right. Now, prior to May 1st, 1994, this conduct or uncooperation and harassment that you've already described for the Jury, you had reported those to your area supervisor, Walt House, is that right?

A. Yes, I had, every time, continually.

When asked to explain this to the jury, Leese remembered that she had other complaints, but was unable to recall what they were. The jury was obviously able to contrast Leese's testimony with that of Greenwell, who had very precise recall of the events which took place during Leese's "investigation," and drew its own conclusions, based on these facts, about the effectiveness of petitioner's response to Greenwell's claims.

It is absurd, then, to assert that the steps taken by Leese in May of 1994, after *21 months* of this behavior, constitute prompt remedial action. Furthermore, the decision in this case does not hold an employer strictly liable for harassment, regardless of the employer's response. Instead, the trier of fact determined that petitioner failed to adequately address Greenwell's complaints for almost two years, and that the action taken by Leese after Greenwell informed him in detail about the environment she endured for two years was neither prompt nor remedial.

Petitioners' complaint is nothing more than that the jury did not believe their version of the story. There is no substantive holding as a result of the decisions below, nor is there a conflict among the circuits imposing an unreasonable burden on employers. This Court's review is therefore unwarranted in this case.

C. The trier of fact heard a variety of evidence regarding petitioners' "legitimate business reason" for demoting Greenwell and chose to reject petitioners' proffered reason.

Of the three elements required to show a *prima facie* case of retaliation,[21] petitioner takes issue with the third, namely, that Greenwell failed to show a causal connection between her protected activity and her employer's adverse action. Remarkably, petitioners misrepresent that they presented "uncontroverted" proof that it had taken the same, if not more severe, action against other employees who had not engaged in a protected activity. Once again, the jury (and obviously the trial judge and the Fifth Circuit) heard otherwise.

Petitioners' own witness explained to the jury that it was Raytheon's practice to allow an employee to explain his or her side of the story when a customer requests the employee's removal from a site. However, that same witness, as well as Raytheon's own Director of Human Resources, admitted that Kim Greenwell was not allowed to give her side of the story prior to her demotion and removal from the site. At the meeting where she was demoted, she was not shown the letters written by the Guard, was not even told who authored the letters, and was given no specifics of the Guard's complaints.

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[21] To demonstrate a *prima facie* case of retaliation, a plaintiff must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action following the protected activity; and (3) a causal link exists between the protected activity and the adverse employment action. *Nowlin v. Resolution Trust Corporation*, 33 F.3d 498 (5th Cir. 1994).

In contrast, the jury heard testimony and saw documents which showed that employees who had not filed discrimination or harassment complaints were given an opportunity to respond to customer complaints before any action was taken.[22] It was therefore within the jury's purview to disregard petitioners' proffered reason for Greenwell's demotion, that the customer requested it, and to logically infer that another, discriminatory, motive was at play. This is indeed the very function of the jury.

When the evidence is viewed as a whole, as the jury did, it is clear that no unrebutted or uncontroverted evidence went ignored by the jury, and thus gave rise to an erroneous decision which has created some internal conflict within the Fifth Circuit. Petitioners' argument on this issue is without merit and undeserving of this Court's review.

II. Petitioners have re-fashioned the exact sufficiency of the evidence arguments presented in post-trial motions into questions on standards of law. These same questions were presented to and reviewed by both the district court and the Fifth Circuit as sufficiency of the evidence arguments, and were deemed by both to be without merit.

A brief inspection of petitioners' Appendix at pages 5a and 6a shows that the issues presented to this Court for review are nothing more than the recycled sufficiency of the evidence claims made by petitioners in post-trial

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[22] Indeed, it was *petitioners'* own exhibits which detailed discussions with other employees about customer complaints before any action was taken.

motions. Petitioners' Argument I is a combination of item numbers 1 and 2 on Appendix page 5a; Argument II appears as item 3; and Argument III is a restatement of item 4.

The district court summed it up well in the following:

> Having presided over this trial, the court firmly believes that taking all the evidence in the light and with all reasonable inferences most favorable to plaintiff Greenwell, there is sufficient evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, and thus, the motions must be denied. In addition to there being sufficient evidence to support the jury's findings, the detailed interrogatories they completed certify that due consideration was given by them with respect to the claims of sexual harassment and retaliation against both Raytheon and Leese.

See, Petitioners' Appendix at page 7a.

CONCLUSION

There is no need for this Court to revisit the sufficiency of the evidence claims made by petitioners in the courts below, regardless of the terms in which these arguments are couched by petitioners. For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of *certiorari* should not issue.

Respectfully submitted,

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